KANDU SUGANG & ANOR A

v.

TRIENEKENS (SARAWAK) SDN BHD

HIGH COURT SABAH & SARAWAK, KUCHING B
RAVINTHRAN PARAMAGURU JC
[JUDICIAL REVIEW NO: KCH-JR-13-2010-I]
23 JUNE 2011

ADMINISTRATIVE LAW: *Judicial Review - Certiorari - Application* C
to quash decision by the Industrial Court - Whether Industrial Court committed procedural impropriety - Whether Industrial court was right in evaluating evidence de novo - Whether Industrial Court erred in considering reasons other than for dismissal - Whether interference warranted D

LABOUR LAW: *Industrial Court - Dismissal - Applicants President and Secretary of employees union - Dismissed for participating in disrupting event organised by company - Whether clothed with immunity by way of position held - Whether dismissal with just cause or excuse* E

The applicants, the president and the secretary of the Kesatuan Pekerja-Pekerja Trienekens (Sarawak) Sdn Bhd ('the union') respectively, were charged, *inter alia*, for writing circulars instigating and/or urging the employees to boycott Trienekens (Sarawak) Sdn Bhd family day function ('first charge') and for being involved in F
circulating the circulars ('second charge'). Subsequently, separate domestic inquiries were conducted on the applicants and they were both found guilty on the first charge. Thereafter, the applicants were dismissed by the respondent company although it G
was recommended by the inquiry panels that the applicants be issued "a written/last warning". The matter was referred to the Industrial Court which found that the acts of the applicants were serious enough to warrant their dismissal. Hence, the application for an order of *certiorari* to quash the decision of the Industrial Court. The grounds raised in the application were: (i) whether the H
Industrial Court had committed procedural impropriety by not inquiring whether a proper domestic inquiry had been held and whether its findings were perverse; (ii) that the Industrial Court had wrongly evaluated the findings and came to the wrong conclusions; (iii) the Industrial Court had not considered the I
position of the applicants as office bearers of the union; (iv) whether the respondent had violated s. 59 of the Industrial

Relations Act 1967 which makes it an offence for an employer to dismiss a workmen because of his membership or leadership of a union.

Held (dismissing the judicial review application with costs):

(1) The Industrial Court had considered the evidence in support of the ground of dismissal meticulously and came to the same conclusion as the two domestic inquiry panels *ie*, that there was ample evidence to justify the finding that the applicants were involved in the writing of the circular. The Industrial Court did not merely refer to the notes of the domestic inquiry but heard afresh the evidence tendered during the reference hearing. Thus, the submission that the Industrial Court had committed procedural impropriety by not asking the question whether the domestic inquiry was flawed was without merit and no error in its procedure. (paras 10 & 12)

(2) In view of the challenge to the domestic inquiry procedure, the Industrial Court had correctly heard the matter *de novo* and decided on the evidence whether the dismissal of the applicants was with just cause or excuse. In the premises, it was wholly unmeritorious to argue that the learned chairman had erred by evaluating the evidence *de novo*. (paras 13 & 15)

(3) The duty of the Industrial Court is to consider the reason given for the dismissal and not examine other reasons (*Goon Kwee Phoy v. J&P Coats (M) Bhd*). On the facts, although the second charge was not the reason given for the dismissal, the Industrial Court found the second charge was proved against the appellant, and had given cogent reasons for the finding. In the circumstances, even if the Industrial Court had committed an error of law, it was not an error that vitiated the entire decision and therefore there was no reason for the court to interfere with the decision of the Industrial Court. (para 17)

(4) The position of the applicants as President and Secretary did not clothe them with immunity to disrupt a compulsory event organised for the purpose of promoting industrial harmony. There was no merit in the submission that "Family Day" was not specifically provided for in the terms of employment. The rules cited by the Industrial Court Chairman are wide enough to cover any compulsory official event even if it is organised for the first time or held on a Sunday. Failure to attend would be tantamount to failing to obey an order or direction

pertaining to the arrangement of the company. Therefore, there was no reason to interfere with the punishment imposed by the employer which was affirmed by the Industrial Court. (paras 22 & 25)

(5) In the instant case the learned Chairman did not commit an error of law by not directly answering the question posed by the applicants. The question whether the applicants were dismissed because of their membership of the Union was not a relevant issue. The task of the Industrial Court was to decide whether, on the evidence, the applicants were dismissed with just cause or excuse. From the passages of the judgment, it was obvious that the Chairman had considered the question posed but found it not relevant for the purpose of deciding misconduct on the part of the applicants. Therefore there was no error of law that justified interference by way of judicial review. (para 28)

Case(s) referred to:

Bumiputra Commerce Bank Bhd v. Mahkamah Perusahaan Malaysia & Anor [2004] 7 CLJ 77 HC ***(dist)***

Dreamland Corp (M) Sdn Bhd v. Choong Chin Sooi & Industrial Court Of Malaysia [1988] 1 CLJ 1; [1988] 1 CLJ (Rep) 39 SC ***(refd)***

Goon Kwee Phoy v. J & P Coats (M) Bhd [1981] 1 LNS 30 FC ***(refd)***

Kathiravelu Ganesan & Anor v. Kojasa Holdings Bhd [1997] 3 CLJ 777 SC ***(refd)***

Menara Panglobal Sdn Bhd v. Arokianathan Sivapiragasam [2006] 2 CLJ 501 CA ***(refd)***

Ngeow Voon Yean v. Sungei Wang Plaza Sdn Bhd & Anor [2004] 1 CLJ 8 CA ***(refd)***

Ng Hock Cheng v. Pengarah Am Penjara & Ors [1998] 1 CLJ 405 FC ***(refd)***

Plaintree Wood Products Sdn Bhd v. Mahkamah Perusahaan Malaysia & Anor [2005] 1 LNS 283 HC ***(refd)***

Rachel Mathews v. BASF (M) Sdn Bhd & Anor [2011] 2 CLJ 354 HC ***(refd)***

Sheila Sangar v. Proton Edar Sdn Bhd & Anor [2009] 8 CLJ 200 HC ***(refd)***

Southern Bank Bhd v. Kamarudin Othman & Anor [2005] 6 CLJ 379 HC ***(refd)***

Legislation referred to:

Industrial Relations Act 1967, ss. 20, 59
Trade Unions Act 1959, ss. 4, 5

For the applicants - Kalveet Singh; M/s Sandhu & Co Advocates
For the respondent - Leonard Shim; M/s Reddi & Co Advocates

Reported by S Barathi

JUDGMENT

Ravinthran Paramaguru JC:

[1] This is an application for an order of certiorari to quash the decision of the Industrial Court in Award No. 1337 of 2010 which was delivered on 19 October 2010. The brief facts of the case are as follows.

[2] The 1st applicant first joined Majlis Bandaraya Kuching Selatan (MBKS) in 1989 and the 2nd applicant first joined Dewan Bandaraya Kuching Utara (DBKU) in 1991. When the garbage collection services of DBKU and MBKS was privatized and taken over by the respondent company, the applicants were reengaged with no loss of rank, seniority or benefits. The 1st applicant worked as driver and the 2nd applicant worked as loader in the Logistics Department. The applicants also held leadership positions in Kesatuan Pekerja-Pekerja Trienekens (Sarawak) Sdn Bhd ("the Union") which is a registered trade union for the employees of the respondent company. The 1st applicant and 2nd applicant were elected as President and Secretary at the inaugural Annual General Meeting of the Union on 10 June 2007. The respondent company organized a family day for the employees on 27 April 2008. The family day function was made compulsory for all employees. According to the applicants, the Union held a meeting on 21 April 2008. At the meeting of the Executive Council, it was decided that Union members should not attend the family day function. On 24 April 2008, the 2nd applicant issued a circular to all Union members to boycott the family day function of the respondent company. He signed off the circular as "Secretary" of the Union. The circular was copied to the President of the Union. The respondent's case is that the Union meeting did not take place and if it did, the meeting did not give them the authority to issue the circular in question.

[3] As it happened, the family day function was not a complete success. At total of 42 employees from Logistics Department did not attend the family day function. The respondent investigated the poor attendance and found that 26 employees did not attend the function because of the call of a boycott by the applicants. A show cause letter was issued to the applicants on 9 May 2008. On 14 May 2008, the applicants replied to the show cause letter. The 1st applicant said that the circular in question was issued by the 2nd applicant in his capacity as Secretary of the Union on the

instruction of the Executive Council. Likewise, the 2nd applicant replied that he issued the circular on the instruction of the Executive Council. Both expressed regret for any misunderstanding that was caused. This explanation did not commend itself to their employers. They convened two separate domestic inquiry panels to hear the following charges against each of the applicants. The two charges preferred against the applicants were as follows:

> 1st Charge
>
> On 24 April 2008 you have been involved in writing a circular dated the same instigating and/or urging workers to boycott Trienekens (Sarawak) Sdn Bhd Family Day on 27 April 2008.
>
> In the circular, among others stated that "sehubungan dengan itu pihak majlis jawatankuasa kerja (MJK) Kesatuan Pekerja-Pekerja Trienekens menyeru semua ahli memulaukan majlis tersebut dengan tidak menghadir diri pada hari tersebut."
>
> 2nd Charge
>
> Between 24 - 27 April 2008 you have been involved in circulating a circular dated 24 April 2008 instigating and/or urging workers to boycott Trienekens (Sarawak) Sdn Bhd Family Day on 27 April 2008

[4] On 27 May 2008, the two separately constituted domestic inquiry panels reached the same decision. Both applicants were found guilty of the first charge only, ie, of being involved in writing the circular urging the members of the Union to boycott the family day function. The domestic inquiry panel that heard the case of the 1st applicant stated its summary of findings as follows:

> The prosecutors have sufficiently proven that the accused have committed the offence based on the evidence tendered that the accused was in the know about the letter and have been involved in writing the letters regardless whether he has acted on behalf of the purported union or on his accord severally with others.

[5] The domestic inquiry panel that heard the case of the 2nd applicant stated its summary of findings as follows:

> The accused admitted that he signed the letter and fully aware and understand the content of the letter.

[6] The punishment recommended by the two domestic inquiry panels was that the applicants be issued "a written/last warning". However, the management of the respondent company ignored this

recommendation and dismissed the two applicants. Thereafter, the applicants proceeded under s. 20 of the Industrial Relations Act 1967. The matter was referred to the Industrial Court by the Minister. At the Industrial Court hearing, the applicants were represented by Mr Andrew Lo who is the Secretary of the Malaysian Trade Union Congress, Sarawak Branch. The respondent company was represented by their advocate Mr Leonard Shim. The Industrial Court handed down its award on 19 October 2010. The Industrial Court found that the acts of the applicants in instigating the boycott were serious enough to warrant their dismissal.

Grounds Of Judicial Review Application

[7] Learned counsel for applicants submitted the following grounds to quash the decision of the Industrial Court:

(i) that the Industrial Court erred in law and/or committed procedural impropriety when it departed from the findings of the domestic inquiry ("D.I.") panels without first asking itself (i) whether a proper D.I. had been held? and/or (ii) whether the conclusions reached at the D.I. were perverse?

(ii) that the Industrial Court erred in law in that despite making correct findings, the Industrial Court wrongly evaluated those findings and came to the wrong conclusions.

(iii) that the Industrial Court erred in law on the evidence before the Court and/or failed to take into account relevant considerations when it held that the Applicants actions tantamount to "acts of misconduct and had breached the terms of their employment contract" and dismissed only the two Appellants for the boycott of the Family Day.

(iv) that the Industrial Court erred in law in refusing to inquire into and decide the question "whether the Respondent had violated s. 59 of the IRA which makes it an offence for an employer to dismiss a workman because of his membership or leadership of a union".

[8] I shall first consider whether the Industrial Court had committed procedural impropriety by not inquiring whether a proper domestic inquiry had been held and whether its findings were perverse. This is the main ground in this judicial review application.

[9] In *Goon Kwee Phoy v. J & P Coats (M) Bhd* [1981] 1 LNS 30, the approach to be adopted by the Industrial Court in hearing a representation under s. 20 of the Industrial Relations Act 1967 was stated by the Federal Court as follows: A

> Where representations are made and are referred to the Industrial Court for enquiry, it is the duty of that court to determine whether the termination or dismissal is with or without just cause or excuse. If the employer chooses to give a reason for the action taken by him, the duty of the Industrial Court will be to enquire whether that excuse or reason has or has not been made out. If it finds as a fact that it has not been proved, then the inevitable conclusion must be that the termination or dismissal was without just cause or excuse. The proper enquiry of the court is the reason advanced by it and that court or the High court cannot go into another reason not relied on by the employer or find one for it. B C D

[10] In the instant case, the respondent had given a reason for the dismissal of applicants. The reason is that the domestic inquiry panels found both applicants were involved in the writing of the circular in question that called for a boycott of the family day function. This reason is the subject matter of the first charge that was preferred against the applicants. The Industrial Court considered the evidence in support of this ground of dismissal meticulously and came to the same conclusion as the two domestic inquiry panels, ie, that there was ample evidence to justify the finding that the applicants were involved in the writing of the circular that called for a boycott of the family day function. It must be noted that the Industrial Court did not merely refer to the notes of the domestic inquiry but heard afresh the evidence tendered during the reference hearing. Counsel for applicants submitted that since a domestic inquiry was held in this case, the Industrial Court should have inquired whether it was properly held and whether its findings were perverse. In support he cited the case of *Bumiputra Commerce Bank Bhd v. Mahkamah Perusahaan Malaysia & Anor* [2004] 7 CLJ 77 where Raus J (as he then was) held as follows: E F G H

> As such, I am in agreement with the submission of the learned counsel for the applicant that where due inquiry has been held, the Industrial Court's jurisdiction is limited to considering whether there was a *prima facie* case against the employee. I

[11] In the above cited case, the domestic inquiry panel dismissed the employee in question. At the reference hearing before the Industrial Court, the employee succeeded in his claim. The employer applied for judicial review and argued that the Industrial Court did not have regard to the validity of the domestic inquiry or the accuracy of its notes of evidence and thereby did not take into account relevant factors. However, the facts of this case are significantly different. The procedure adopted in the domestic inquiry was attacked by the applicants themselves during the Industrial Court hearing. The applicants in their Statement of Case stated as follows:

> The domestic inquiry is a farce; offend all rules of natural justice and in fragrant violation of all accepted procedures and rules of natural justice.

[12] The learned Chairman did not state in his award whether the domestic inquiry was properly conducted or whether its findings were perverse. However, he proceeded to analyze the evidence tendered before him afresh and decided that the applicants were involved in the writing of the circular in question. I see no error in this procedure. In *Bumiputra Commerce Bank Bhd v. Mahkamah Perusahaan and Anor (supra)*, the applicant had stood by the findings of the domestic inquiry panel which was not considered by the Industrial Court. In the instant case, the applicant had pleaded outright that the procedure adopted by the domestic inquiry was a farce. In my opinion, the submission that the Industrial Court committed procedural impropriety by not asking the question whether the domestic inquiry was flawed is without merit. This is because by pleading that the domestic inquiry was a farce, the applicants had taken the position that the evidence tendered in the domestic inquiry was not relevant at the Industrial Court hearing. Both the applicants and respondent had elected to tender evidence afresh at the domestic inquiry. It was therefore unnecessary for the Industrial Court to reconsider the findings of the domestic inquiry. The case of *Bumiputra Commerce Bank Bhd v Mahkamah Perusahaan and Anor (supra)* did not decide that the Industrial Court should be bound by the findings in the domestic inquiry. At this point, I must perforce make reference to the case of *Plaintree Wood Products Sdn Bhd v. Mahkamah Perusahaan Malaysia & Anor* [2005] 1 LNS 283 which was not cited to me. It is a judgment of the same High Court Judge who decided *Bumiputra Commerce Bank Bhd v. Mahkamah Perusahaan & Anor (supra)*. In *Plaintree Wood Products Sdn Bhd v. Mahkamah*

Perusahaan Malaysia & Anor (supra), the applicant posed the question whether in a case where a domestic inquiry had been held, the Industrial Court is limited to inquiring whether there was procedural impropriety without conducting a full trial. In his judgment, Raus J (as he then was) said that *Bumiputra Commerce Bank Bhd v. Mahkamah Perusahaan and Anor (supra)* did not decide that the Industrial Court is bound by the findings of the domestic inquiry. His Lordship said as follows:

> 3. Kes responden telah dibawa ke Mahkamah Perusahaan. Di Mahkamah Perusahaan, semasa kes hendak dibicarakan, peguam pemohon telah mengemukakan satu persoalan undang-undang, iaitu "sekiranya domestic inquiry diadakan, Mahkamah Perusahaan hanya mempunyai tugas untuk mempastikan prosedur dan keadilan kesahan semulajadi dalam domestic inquiry adalah dipatuhi untuk meperolehi suatu keputusan yang betul, setelah meneliti keterangan dan testimony saksi-saksi tanpa meneruskan apa-apa pembicaraan penuh". Peguam pemohon telah mengemukakan kes *Bumiputra Commerce Bank Berhad v. Mahkamah Perusahaan Malaysia & Anor.* [2004] 7 CLJ 77 sebagai sandaran kepada hujahannya.
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> 4. Mahkamah Perusahaan telah menolak unjuran undang-undang yang diutarakan oleh peguam pemohon dan mengarahkan pembicaraan penuh dijalankan. Berbangkit dari keputusan itulah maka pemohon membuat permohonan ini.
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> 5. Jelas, asas permohonan pemohon adalah kes Bumiputra Commerce Sdn. Bhd. yang saya putuskan terdahulu. Dengan hormatnya saya berpendapat perkara yang diputuskan di dalam kes tersebut adalah berbeza dengan kes pemohon ini. Di dalam kes Bumiputra Commerce Sdn. Bhd., apa yang saya putuskan adalah mengenai kegagalan Mahkamah Perusahaan untuk mengambilkira nota keterangan domestic inquiry yang telah dikemukakan sebagai keterangan. Mahkamah Perusahaan di dalam kes itu tidak langsung merujuk kepada nota keterangan domestic inquiry dalam membuat penilaian fakta dan kegagalan itu telah saya putuskan sebagai suatu kesilapan undang-undang. Di dalam kes pemohon ini, keadaan adalah berbeza. Kes pemohon di Mahkamah Perusahaan adalah masih di peringkat pembicaraan. Pada saya, responden kedua adalah bebas untuk membentangkan kesnya ini dan untuk menyokong dakwaan bahawa beliau telah dibuang kerja tanpa alasan yang munasabah. Di pihak pemohon pula, jika terdapat keterangan mengenai domestic inquiry, terpulanglah kepada pemohon untuk mengemukakannya. Tugas Mahkamah Perusahaan ialah

A untuk membuat keputusan berpandukan keseluruhan keterangan yang dikemukakan melalui keterangan-keterangan saksi yang dikemukakan oleh kedua-dua pihak. Sudah tentu Mahkamah Perusahaan tidak semata-mata terikat kepada nota prosiding di dalam domestic inquiry. Jadi Mahkamah Perusahaan adalah tidak silap untuk mengarahkan pembicaraan penuh dijalankan di dalam kes ini. (emphasis supplied)

[13] It is clear from the above passage that the Industrial Court is not bound by the findings of the domestic inquiry even if the notes of evidence are properly recorded and the principles of natural justice are followed. After all, it is the duty of the Industrial Court under s. 20 of the Industrial Relations Act 1967 to determine whether an employee had been dismissed with just cause or excuse. This means that the Industrial Court has original jurisdiction to determine this issue as opposed to appellate or review jurisdiction. In view of the challenge to the domestic inquiry procedure, the Industrial Court had correctly heard the matter *de novo* and decided on the evidence whether the dismissal of the applicants was with just cause or excuse. If a domestic inquiry is flawed, this is the correct procedure. In *Ngeow Voon Yean v. Sungei Wang Plaza Sdn Bhd & Anor* [2004] 1 CLJ 8, Richard Malanjum JCA (as he then was) echoing what was said in *Dreamland Corp (M) Sdn Bhd v. Choong Chin Sooi & Industrial Court Of Malaysia* [1988] 1 CLJ 1; [1988] 1 CLJ (Rep) 39 opined as follows:

> Having perused the authorities we are in agreement with learned counsel for the respondent that defect or even absence of domestic enquiry should not be considered fatal thereby making dismissal of an employee bad.

[14] In the more recent case of *Rachel Mathews v. BASF (M) Sdn Bhd & Anor* [2011] 1 ILR 485, Mohamad Ariff J surveyed a number of cases on the issue of a flawed domestic inquiry and came to the following conclusion:

> The cases suggest that if a domestic inquiry is conducted fairly, the result thereof would be treated as *prima facie* evidence of proven misconduct. That certainly was not the case here. However, the Industrial Court in this case had scrutinized the matter *de novo*, and that being so it could validly come to its own conclusion as to whether the employee has or has not been guilty of misconduct and dismissed with just cause or excuse. See for example the principles established in *Wong Yuen Hock v. Syarikat Hong Leong Assurance Sdn Bhd & Another Appeal* [1995] 3 CLJ

344; *Dreamland Corp. (M) Sdn Bhd v. Choong Chin Sooi & Industrial Court of Malaysia* [1988] 1 CLJ 1; [1988] 1 CLJ (Rep) 39 and the Supreme Court of India decision in *Workmen of the Motipur Sugar Factory v. Motipur Sugar Factory Pte. Ltd. AIR* 1965 SC 1803.

[15] In concluding this part of the judgment, at the risk of repetition, I must emphasize that the applicants themselves had pleaded that the domestic inquiry proceeding was a farce. In the premises, it is wholly unmeritorious for their counsel now to argue that the learned Chairman had erred by evaluating the evidence *de novo* to determine whether the dismissal was without just cause or excuse.

Duty Of Court In Judicial Review Application

[16] In the case of *Menara Panglobal Sdn Bhd v. Arokianathan Sivapiragasam* [2006] 2 CLJ 501, the Court of Appeal gave the following guidelines in reviewing a decision of the Industrial Court:

(i) judicial review is not an appeal from a decision but a review of the manner in which the decision was made;

(ii) the High Court is not entitled on an application for judicial review to consider whether the decision itself, on the merits of the facts, was fair and reasonable;

(iii) the High Court, through judicial review, should not introduce technicalities of the court of law to the Industrial Court; this would certainly be so as s. 30(5) of the Act imposes a duty upon the Industrial Court to have regard to substantial merits of a case rather than to technicalities and it also requires the Industrial Court to decide a case in accordance with equity and good conscience;

(iv) the main and only function of the Industrial Court in dealing with a reference under s. 20 of the Act is to determine whether the misconduct or irregularities complained of by the management as to the grounds of dismissal were in fact committed by the workman and if so, whether such grounds constitute just cause or excuse for the dismissal;

(v) the Industrial Court should not be burdened with the technicalities regarding standard of proof, the rules of evidence and procedure that are applied in the court of law;

(vi) the High Court will not interfere with finding of facts by the Industrial Court unless the same are completely unsupported by evidence and further, will not interfere merely because it

A may come to different conclusions on facts on the basis of the same evidence; weighing and assessing the evidence of the witnesses is the function of the Industrial Court and not that of the High Court.

B [18] However if an error of law is committed or some relevant factor is not considered or some irrelevant factor is taken into consideration, the decision of the Industrial Court can be examined for substance as an inferior tribunal has no discretion to commit an error of law (*Anisminic v. Foreign Compensation Commission* [1969] 2 AC 147).

C **[17]** In the instant case, the domestic inquiry panels found the applicants guilty of one charge only, ie, that they were involved in the writing of the boycott letter in question. They recommended that a final warning be given to the applicants. The Industrial Court found that the second charge was proved against the D appellants as well. This finding was challenged by counsel for applicants. The learned Chairman gave cogent reasons for his finding. The applicants had admitted during the hearing before the Industrial Court that they had distributed the boycott circular to members. However, it must be noted that the finding on the E second charge is not the reason given by the respondent for the dismissal. The reason for the dismissal is that they were found guilty of the charge of being involved in the writing of the boycott circular which is the subject matter of the 1st charge. As stated in *Goon Kwee Phoy v. J & P Coats (M) Bhd* [1981] 1 LNS 30, F the duty of the Industrial Court is to consider the reason given for the dismissal, if one is given, and not examine other reasons. However, I see no reason to interfere with decision of the Industrial Court. Even if the Industrial Court had committed an G error of law by making a finding on the second charge, in my opinion it is not an error that vitiated the entire decision. As stated by Mohamad Ariff Yusof JC in *Sheila Sangar v. Proton Edar Sdn Bhd & Anor* [2009] 8 CLJ 200:

H I might add here for completeness that even the ground of error of law, where it exists, cannot be regarded as an automatic entitlement to judicial review. The preponderant line of authority appears to support a more limited view, namely such an error will only vitiate a decision if it is "an error of law on which the I decision of the case depends" (*Perlman v. Harrow School Governors* [1979] QB 56) - in other words it must be material to the decision.

[18] In the instant case, the Industrial Court went through the evidence tendered by the witnesses and came to the same conclusion as the domestic inquiry panel in respect of the first charge, ie, that the applicants were involved in drafting the boycott circular. In the premises, it cannot be said that the Industrial Court had considered an extraneous reason for the dismissal. The Industrial Court had found on the evidence, especially on the admission of the applicants, that they had been involved in the drafting of the boycott circular in question. The Industrial Court ruled that the applicants had committed serious misconduct in writing the circular that called for the boycott of an important event designed to promote understanding and harmony between employees and management. Therefore, it would not have mattered if the Industrial Court had made an error in considering the second charge as well.

[19] The next question to consider is whether the finding of the Industrial Court had been affected by illegality, irrationality, procedural impropriety and proportionality. Learned counsel for applicants submitted that the learned Chairman made the wrong conclusion when he found as follows:

> In conclusion, I find that the acts of the two Claimants herein in writing and in distributing the circular to boycott the Company's Family Day amounted to instigation and which were serious acts of misconduct on their part. The Family Day was an official function of the Company. The fact that they were doing so in their capacity as a union officials did not provide them with immunity from any disciplinary action taken by the Company against them. They were the leaders of the Union and their acts in instigating the other union members to boycott the Family Day were serious enough to warrant the Company to dismiss them expeditiously from their jobs.

[20] Counsel for applicants submitted that the decision to issue the circular was not the decision of the applicants but that of the Union of which they were office bearers. He further submitted that it was unreasonable and irrational to pin the blame on the applicants alone. I find no merit in the above submission. The High Court in exercising review jurisdiction should resist the temptation to substitute its own view of whether there was misconduct unless the decision was arrived in defiance of logic and that no reasonable tribunal similarly circumstanced would have done so. The applicants were aware that the family day was an

official function of their employer to foster harmony between workers and management. They admitted during the hearing that the words of the circular instigated the employees to boycott the family day. The learned Chairman examined the words employed in the circular and concluded that it was couched in emotive and inflammatory language. In short, he said it was a rallying cry. I do not see any error of law in this finding. Based on the evidence and the admission of the applicants, the learned Chairman was perfectly entitled to make a finding that the applicants had instigated the boycott by drafting the circular in question.

[21] The next issue that counsel for applicants addressed is that the Industrial Court had not considered the position of the applicants as office bearers of the Union. The Industrial Court Chairman considered ss. 4 and 5 of the Trade Unions Act 1959 which prohibits employers from preventing employees from joining a Trade Union or participating in their activities. However, he did not find that there was a transgression of the injunction encapsulated in ss. 4 and 5. This is because he opined that the applicants as employees owed a duty to their employer as well. Therefore, they cannot claim immunity as union officials if their actions breached their terms of employment and amounted to serious misconduct. He cited the following terms of employment to which both applicants were subject to:

> Fail to faithfully and diligently perform such duties and accept such responsibility, as may from time to time be assigned to you by the company and at all times, to endeavor to the utmost of your ability to promote and advance the interest of the company.
>
> Fail to obey and comply with all orders and directions given to you by the company and faithfully observe all the rules and regulations, procedures practices and arrangements of the company for the time being in force.

[22] By making the family day compulsory, the management of the respondent had expressly given a "direction" or "order" to all employees. Therefore the Industrial Court was certainly correct in its finding that the terms of the employment had been breached because the applicants had, apart from boycotting the family day, went a step further to instigate other employees who are union members to participate in the boycott as well. The Industrial Court had also cited a host of precedents where it has been held that disrupting or boycotting official functions such as company dinners held outside of office hours had been held as constituting

misconduct. I therefore find nothing illogical or unreasonable in the finding of the Industrial Court that the position of the applicants as President and Secretary does not clothe them with immunity to disrupt a compulsory event organized for the purpose of promoting industrial harmony. I also see no merit in the submission that "Family Day" is not specifically provided for in the terms of employment. The rules cited by the Industrial Court Chairman are wide enough to cover any compulsory official event even if it is organized for the first time or held on a Sunday. Failure to attend would be tantamount to failing to obey an order or direction pertaining to the arrangements of the company.

[23] Learned counsel for applicants also submitted that no loss was occasioned and that the punishment imposed was unreasonable. This is not strictly correct. The learned Chairman mentioned in his award that the respondent had spent about RM50,000 to organize the family day function which was marred by the boycott. As for the punishment of dismissal, the learned Chairman held that the applicants had committed serious misconduct by instigating the boycott. The domestic inquiry panels had recommended the punishment of warning but the respondent dismissed the applicants. The learned Chairman said that the respondent had the advantage of having overview of the whole situation and the court should be very slow to substitute its own order for that of the employer without good reasons. I see no error of law in the above statement. The Industrial Court found that the misconduct was serious. The respondent as the employer thought so as well. It is elementary that a court sitting in a review jurisdiction should be very slow to interfere with the penalty imposed on an employee. The finding of the Industrial Court that the misconduct was serious was not successfully challenged under any of the exceptions to the principle that the review court will not examine a decision of an administrative tribunal for substance. Learned counsel for respondent is correct to remind the court of the dicta of the Federal Court in *Ng Hock Cheng v. Pengarah Am Penjara & Ors* [1998] 1 CLJ 405 as follows:

> In this respect, the majority judgment of the Court of Appeal in *Tan Teck Seng v. Suruhanjaya Perkhidmatan & Anor* could not stand with the instant decision of the Federal Court. The dissenting judgment in *Teck Seng v. Suruhanjaya Perkhidmatan & Anor* was, therefore, right in restating the principle that: the test is not what the Court of Appeal or the High court thinks should be the appropriate penalty. Whether dismissal or a lesser penalty

(like a reduction in rank) was appropriate is not for the court to say. The court must not substitute its own views as to what is the appropriate penalty (for the employee's misconduct) for the view of the particular employer concerned.

[24] In *Southern Bank Bhd v. Kamarudin Othman & Anor* [2005] 6 CLJ 379 as well, Wan Afrah Ibrahim JC (as Her Ladyship then was) echoed the same principle in the following passage:

> Nonetheless, I concede that the facts of Tan Tek Seng's case concerns the intervention of the High Court in respect of punishment of a public servant. However, it is pertinent to note that NH Chan JCA specifically made reference to the Industrial Court when he said "Industrial Court must not substitute its own view as to what was the appropriate penalty for the employee's misconduct."

[25] In the premises, there is no reason to interfere with the punishment imposed by the employer which was affirmed by the Industrial Court.

[26] The last point raised by counsel for applicants is that the Industrial Court failed to consider whether the respondent had violated s. 59 of the Industrial Relations Act 1967 which makes it an offence for an employer to dismiss a workman because of his membership or leadership of a union. Counsel for applicants submitted that the learned Chairman erred in not answering the above question which was raised in the statement of case. The learned Chairman discussed the issue but he declined to directly answer the question. He considered the question in the following passage:

> The Claimants further contended that in dismissing the Claimants the Company had also violated Section 59 of the Act, that is, that it had dismissed them because of their union activities.
>
> They also contended that they had been discriminated against and victimised by the Company for carrying out their functions as trade union officers.

[27] The learned Chairman then ruled as follows:

> In the circumstances of the case before this Court, though the 2 Claimants here were officials of a legitimate Union, and though acting as they did pursuant to the directions of the Union, they cannot claim immunity for their actions if their actions had tantamounted to acts of misconduct and had breached the terms of their employment contract, as they had done in this case.

[28] Counsel for applicants cited the case of *Kathiravelu Ganesan v. Kojasa Holdings Bhd* [1997] 3 CLJ 777. The question that arose in that case was a question of threshold jurisdiction, ie, the Industrial Court was not invested with the jurisdiction to hear the reference because the employee worked in Singapore at the material time. However, the applicant did not the challenge the decision of the Minister to refer the dispute to the Industrial Court. It was held in that case that when a jurisdictional challenge is mounted, the Industrial Court must decide the said dispute to its conclusion and in the process deal with the jurisdictional question. However, in the instant case, the learned Chairman did not commit an error of law by not directly answering the question posed by the applicants. It is clear from the way he dealt with the issue in his judgment, the question whether the applicants were dismissed because of their membership of the Union was not a relevant issue. The case before the domestic inquiry was that the applicants had committed misconduct by instigating a boycott of the family day. This was the reason given for their dismissal. The task of the Industrial Court was to decide whether, on the evidence, applicants were dismissed with just cause or excuse. After careful assessment of the evidence, he came to the conclusion that the applicants were involved in the drafting of the boycott circular. An administrative tribunal may commit a jurisdictional error in the wider sense or an anisminic error by not asking a relevant question. In the instant case, from the passages of his judgment that I cited, it is obvious that he considered the question posed but found it not relevant for the purpose of deciding misconduct on the part of the applicants. I agree with learned Chairman that the only issue was whether there was misconduct on the part of the applicants. I therefore do not see any error of law that justifies interference by way of judicial review.

[29] In conclusion, for all the above reasons, I shall dismiss the judicial review application with costs of RM5,000.